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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

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DATE: SEP 15 2011 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a hotel. It seeks to employ the beneficiary permanently in the United States as a front office manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner had not established that the beneficiary possessed the requisite educational credentials as set forth on the labor certification.

On appeal, counsel submits additional evidence and asserts that the petition merits approval because the beneficiary completed the program requirements of a master's degree.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act) provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.[1] If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."[2]

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[1] The labor certification requires a master's degree and two years of experience in the position offered, or two years of experience in the related occupation of guest services. The labor certification does not state that any alternate combination of education and experience is acceptable or set forth that the beneficiary may qualify based on a bachelor's degree and five years of experience. Additionally, nothing in the record shows that the beneficiary could meet the standard of a bachelor's degree plus five years of experience. Issues with the beneficiary's claimed experience will be addressed later in the decision.

[2] The regulation at 8 C.F.R. § 204.5(K)(3)(ii) provides that any three of the following may be

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states:

To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

(A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
(B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

The regulation at 8 C.F.R. 204.5(k)(2) states, in pertinent part:

> *Advanced degree* means any United States academic or professional degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

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accepted as evidence of exceptional ability;

(1) Degree relating to area of exceptional ability;
(2) Letter from current or former employer showing at least 10 years experience;
(3) License to practice profession;
(4) Person has commanded a salary or remuneration demonstrating exceptional ability;
(5) Membership in professional association;
(6) Recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organization.

Comparable evidence may be submitted if above categories are inapplicable. This evidence may include expert opinion letters.

These criteria serve as guidelines, but evidence that a beneficiary may meet three of these criteria is not dispositive of whether the beneficiary is an alien of exceptional ability. It must also be established that the beneficiary possesses a degree of expertise significantly above that ordinarily encountered in the sciences, arts or business. This has not been asserted in this case and the AAO finds no evidence in the record that the beneficiary would qualify for a classification as an alien of exceptional ability. The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as a "degree of expertise significantly above that ordinarily encountered." In this case, the petitioner has not asserted that the beneficiary falls within this category.

U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *See generally Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The petitioner must show that the beneficiary has all the education, training, and experience specified on the labor certification as of the petition's priority date, which is the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); Matter *of Wing's Tea House,* 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the ETA Form 9089 was accepted for processing on May 1, 2007, which establishes the priority date.

In this case, Part H of the ETA Form 9089 indicates that the minimum level of education required for the position is a Masters degree in Business Administration. The labor certification also states that 24 months (2 years) in the proffered job of front office manager is required or 24 months (2 years) in an alternate occupation is acceptable. The alternate occupation is defined as "guest services related occupation." No alternate field of study or combination of education and experience is acceptable. A foreign educational equivalent is also not acceptable pursuant to the petitioner's response in H.9.[3]

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[3] In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees

The record indicates that petitioner initially submitted a copy of the beneficiary's grade transcript of graduate studies at Nova Southeastern University, Florida. In response to the director's subsequent request for evidence that the beneficiary possess a Master's degree in Business Administration, the petitioner provided a letter, dated April 9, 2008, from [redacted] an academic advisor at Nova. She states that although the beneficiary completed the program requirements of a Master's in Business Administration, his anticipated conferral date is April 30, 2008, after the May 1, 2007 priority date.[4] Another letter, dated April 16, 2008, from [redacted] also indicates that the beneficiary awaits the conferral of his degree although he completed the program requirements in 2002.[5]

The director denied the petition because the petitioner could not produce evidence that the beneficiary had been awarded a Master's degree in Business Administration as of the priority date of May 1, 2007. The director determined that fulfilling the course of study requirements toward a Master's degree did not equate to actually holding a Master's degree.

On appeal, counsel provides a copy of the beneficiary's diploma from Nova Southeastern University showing that he was awarded a Master's degree in Business Administration on April 30, 2008. However, counsel asserts that as long as the beneficiary's academic record indicates that he had completed the Master's program requirements, then he could be considered as holding an advanced degree within the meaning of section 203(b)(2) of the Act prior to the date of the diploma. In support of this contention, counsel submits a letter, dated July 10, 2008, from [redacted] the Director of Academic Advising of the [redacted] of Nova Southeastern University to the beneficiary. She states that the beneficiary had a financial

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> must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

[4]The letter indicates that the beneficiary had not completed his degree application.

[5] The record contains a transcript for studies dated April 16, 2008 showing 43 earned program hours. A second transcript in the record dated May 8, 2003 states that the beneficiary completed 39 hours. Nothing in the record states how many credits are required for degree completion. Additionally, as the beneficiary obtained four additional credits between the dates of the issued transcripts, and only the second 2008 transcript reflects the additional credits, it is unclear how the letters stating all requirements were completed in 2002 can be reconciled. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner must resolve this issue in any further filings.

hold placed in his records but that his "last date of attendance was 12/31/2002 and that you were eligible for registration and in 'good standing' effective 11/15/2002. As of 12/31/2002, no bars or prohibitions existed towards consideration of your holding an MBA from our institution as all academic requirements had been met."

The petitioner also submits two opinions from [redacted] of Worldwide Education Evaluators, Inc. and Professor [redacted] Both opine that holding a degree may be considered to be when an individual has successfully completed the academic requirements as compared to actually conferral of a degree. [redacted] indicates that the beneficiary could be considered as holding a degree as of December 31, 2002.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972).

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport,* 495 U.S. 552 (1990). Statutory language must be given conclusive weight unless the legislature expresses in intention to the contrary. *Int'l Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB,* 814 F.2d 697 (D.C. Cir. 1987). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR,* 930 F.2d 975 (2d Cir.), *cert. denied,* 112 S. Ct. 416 (1991).

Additionally, we are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). We are to contstrue the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.,* 486 U.S. 281, 291 (1988)(holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also Coit Independence Joint Venture v. Federal Sav. And Loan Ins. Corp.,* 489 U.S. 561 (1989); *Matter of W-F-,* 21 I&N Dec. 503 (BIA1996).

An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). We find that for the purpose of seeking a visa classification pursuant to section 203(b)(2) of the Act, the plain and ordinary meaning of "holding an advanced degree" means the actual conferral of such a degree from an accredited United States college or university or a foreign equivalent degree. We see no indication that the

legislative intent included any other construction other than the actual award of such a degree. As noted by the director, without the actual conferral of a Master's degree, not the "consideration" that an MBA might be awarded as indicated in [redacted] letter, USCIS does not recognize that a beneficiary held an advanced degree prior to the April 30, 2008, date of conferral.[6] As this occurred almost one year after the priority date of May 1, 2007, the petitioner has not established that the beneficiary possessed the requisite Master's degree in Business Administration as of the priority date. For this reason, the petition may not be approved. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Beyond the decision of the director, the petitioner has not established that the beneficiary's work experience acquired with the petitioner may be used to qualify the beneficiary for the certified position of front office manager. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting the AAO *de novo* authority).

It is noted that on the ETA Form 9089, which was signed under penalty of perjury by the petitioner and the beneficiary, in response to the following questions, the answers were:

> **J.18** Does the alien have the experience as required for the requested job opportunity indicated in question H.6? (Question H.6 indicates that 24 months of experience is required in the job offered of (front office manager)). The answer to J.18 is "no."
> **J.20** Does the alien have the experience in an alternate occupation specified in question H.10? (H.10 and H.10-B specify that 24 months of experience in an alternate occupation defined as "guest services related occupation" would be acceptable.) The answer to J.20 is "yes."
> **J.21**. Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested? The answer to J.21 is "no."
> **J.23** Is the alien currently employed by the petitioning employer? The answer is "yes."

The beneficiary's experience as listed on Part K of the ETA Form 9089 lists two jobs, both with the petitioner. From December 22, 2003 to March 1, 2006, it is claimed that he worked as a "guest

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[6]Additionally, as noted in a prior footnote, it is unclear when, between the dates of the issued transcripts of May 8, 2003 and April 16, 2008, the university issued the remaining four credits to the beneficiary. As such, despite the letters submitted, from the record, we cannot determine that the beneficiary received all the necessary credits required for graduation or program completion by the priority date.

services manager." From March 1, 2006 to (no date is given) date of signing the ETA Form 9089, which is August 13, 2007, it is claimed that the beneficiary has been an "assistant director of front office." A letter, dated July 12, 2007, from the petitioner confirms these jobs and dates. However, a G-325A, Biographic Information, submitted with the beneficiary's I-485, Application to Register Permanent Residence or Adjust Status, which was signed under penalty of perjury by the beneficiary on July 30, 2007, claims that he has performed in the position offered for the petitioner as "front office manager" from February 2001.

If an alien beneficiary already is employed by the employer, the employer cannot require U.S. applicants to possess training and/or experience beyond what the alien possessed at the time of initial hire by the employer, including as a contract employee: (1) unless the alien gained the experience while working for the employer in a position *not substantially comparable*[7] to the position for which certification is sought (emphasis added); or (2) the employer demonstrates that it is no longer feasible to train a worker to qualify for the position.[8]

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[7] A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

> (5) For purposes of this paragraph (i)
>
> . . .
>
> (ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing potion descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

[8] The regulation at 20 C.F.R. § 656.17 states:

> (h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation
>
> . . . .
>
> (4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and
>
> (i) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.
>
> (ii) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).
>
> (1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.
>
> (2) The employer must not have hired workers with less training or experience for

In this case, the ETA Form 9089 indicates that the employer and beneficiary are relying on the beneficiary's experience in the alternate occupation as a guest services manager for the employer stated to commence on December 22, 2003 and ended on March 1, 2006. It is claimed not to be substantially comparable to the proffered position, consistent with the regulatory requirements. However, as noted above, the beneficiary claimed on the G-325A that he has worked for the petitioner as a front office manager beginning in February 2001 until the present (date of signing) on July 30, 2007. This is not consistent with the ETA Form 9089 and not consistent with the petitioner's letter. Further, if it is true, then the beneficiary has held the proffered position during his entire employment with the petitioner and therefore, it may not be used to qualify him for the certified job as it must be considered to be substantially comparable to the proffered position. The petitioner did not indicate on the ETA Form 9089 that it was relying on the beneficiary's position as a front office manager. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and

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jobs substantially comparable to that involved in the job opportunity.

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:
    (i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
    (ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

(5) For the purpose of this paragraph(i)
    (i) The term "employer means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.
    (ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner must address this issue in any further filings. As the current record stands, the petitioner has not credibly established that the beneficiary has the requisite 24 months work experience as required by the ETA Form 9089.[9]

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

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[9] The regulation at 8 C.F.R. § 204.5 provides in pertinent part:

> (g) *Initial Evidence*—(1) *General.* Specific requirements for initial supporting documents for the various employment-based immigrant classifications are set forth in this section. . . Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.